

JAN 18 2006**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICARDO LOPEZ-OROZCO,

Defendant - Appellant.

No. 04-30120

D.C. No. CR-03-02148-EFS

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Submitted January 9, 2006^{**}

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Ricardo Lopez-Orozco appeals the sentence imposed following his guilty plea to being an alien found in the United States after deportation without permission in violation of 8 U.S.C. § 1326.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Lopez-Orozco contends that his constitutional rights were violated by the enhancement of his sentence above the two-year maximum set forth in 8 U.S.C. § 1326(a), based on a prior conviction that was not charged in the indictment, proved to a jury, or admitted by Lopez-Orozco. This contention is, as Lopez-Orozco concedes, foreclosed. *United States v. Von Brown*, 417 F.3d 1077, 1078-79 (9th Cir. 2005) (per curiam). *See also United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (noting that we continue to be bound by the Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a district court may enhance a sentence on the basis of prior convictions, even if the fact of those convictions was not found by a jury beyond a reasonable doubt).

In supplemental briefing, Lopez-Orozco contends that he was entitled to have a jury determine that the prior conviction that formed the basis for his 4-level enhancement under U.S.S.G. § 2L1.2(b)(1)(D) constituted a "felony" within the meaning of the Guidelines. This contention is likewise foreclosed. *See Von Brown, supra.*, at 1079-80 (the categorization of a prior conviction as a "violent felony" or a "crime of violence" is a legal question, not a factual question to be proved to a jury).

Although the sentence imposed did not amount to Sixth Amendment error, the district court did impose the sentence prior to the Supreme Court's decision in

United States v. Booker, 543 U.S. 220 (2005), under the then-mandatory Sentencing Guidelines. Because we cannot tell from the record whether the district court would have imposed a materially different sentence had it known the Guidelines were advisory, we remand the case to answer that question and to proceed according to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error). If Lopez-Orozco does not want to pursue resentencing, he should promptly notify the district court judge on remand. *See Ameline*, 409 F.3d at 1084.

REMANDED.